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Supreme Court of the United States

October Term, 1945.

No. 745.

GABRIELLE GIORDANO,

Petitioner,

vs.

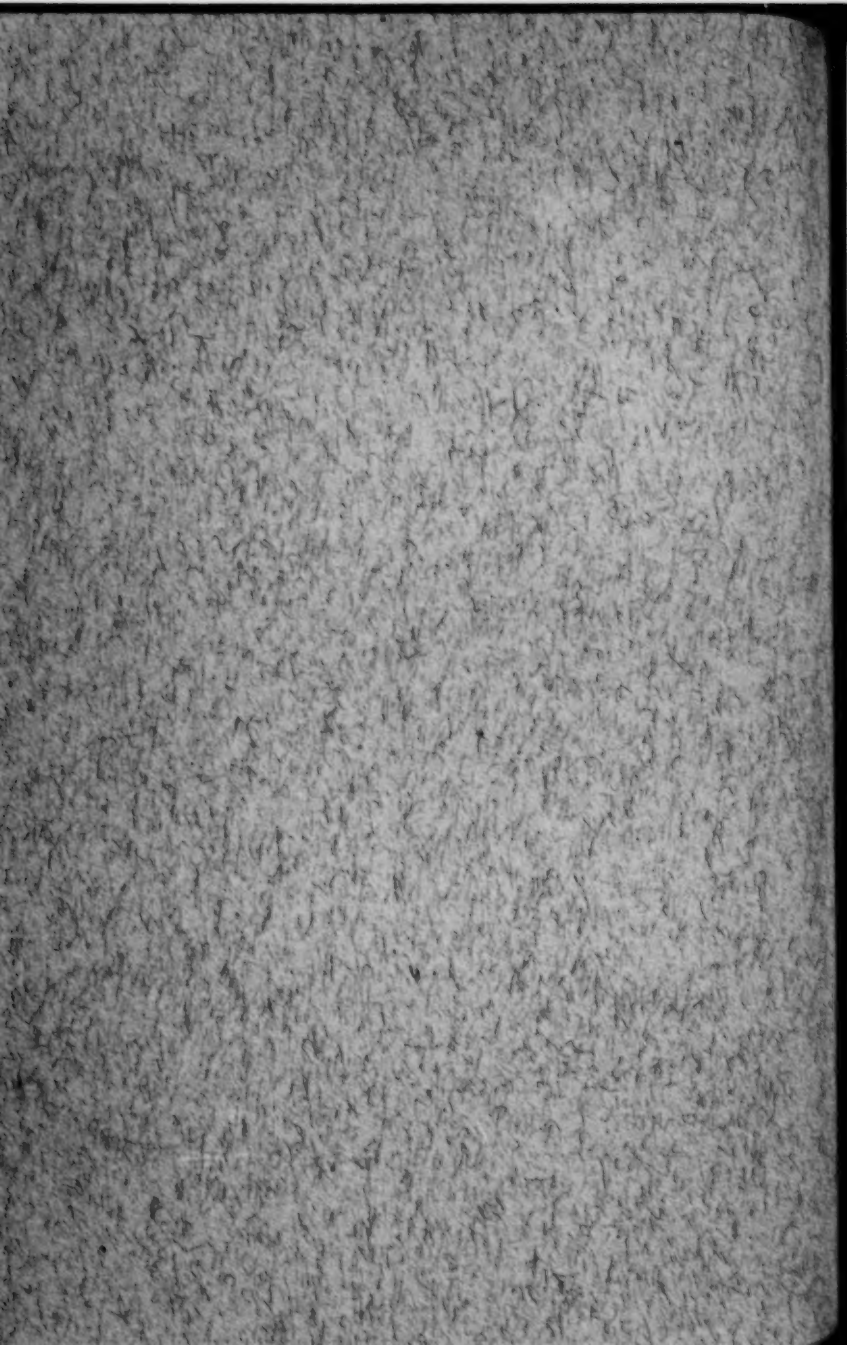
THE ASBURY PARK AND OCEAN GROVE
BANK, et als.,

Respondents.

On Petition for Certiorari.

Brief of Respondents

THEODORE D. PARSONS,
Attorney for Respondents.



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SUPREME COURT OF THE UNITED STATES.

October Term, 1945.

No. 745.

GABRIELLE GIORDANO,

Petitioner,

vs.

**THE ASBURY PARK AND OCEAN GROVE BANK, Body
Corporate; HARRY N. JOHNSON, Former Sheriff of
Monmouth County; THEODORE ROWE; LOUIS
STRADA, and WILLIAM R. O'BRIEN, Sheriff of Mon-
mouth County,**

Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI.**

MAY IT PLEASE THE COURT:

The respondents, **THE ASBURY PARK AND OCEAN GROVE BANK**, body corporate, **HARRY N. JOHNSON**, Former Sheriff of Monmouth County, **THEODORE ROWE**, **LOUIS STRADA** and **WILLIAM R. O'BRIEN**, Sheriff of Monmouth County, respectfully show:

STATEMENT.

Respondents, in presenting their brief to this Honorable Court in opposition to the application of the petitioner, **Gabrielle Giordano**, for a writ of certiorari, are handicapped in a proper presentation because neither the petitioner nor his counsel have served upon the respondents, or their counsel, a copy of the printed record.

The record in the court below consisted of a State of Case, together with a Stipulated Supplemental State of Case and Motion Record. This Stipulated Supplemental State of Case and Motion Record has not been printed in the record now before this Court according to information furnished respondents by counsel for the petitioner.

This Stipulated Supplemental State of Case and Motion Record, a copy of which is submitted with this brief, shows the closing of the respondent bank by order of the Commissioner of Banking and Insurance on December 24th, 1931, and its remaining closed until May 1st, 1933, when it resumed business upon conditions approved by the Commissioner of Banking and Insurance of the State of New Jersey (See Stipulated Supplemental State of Case, page 2, paragraph 1).

All advertisements required by Statute, Pamphlet Laws of New Jersey 1931, Chapter 256, were published (See Exhibits B and C annexed to Stipulated Supplemental

State of Case, page 5, page 7). Under this Statute prescribing such publication, all depositors and other creditors of the Bank were determined and distribution made accordingly.

On May 1st, 1933, the Bank re-opened under a plan approved by the Commissioner of Banking and Insurance of the State of New Jersey, and under this plan 30,000 shares of preferred stock were issued, delivered and held in trust for all depositors and other creditors who had duly proved their claims.

The Court of Errors and Appeals of the State of New Jersey held in the case of *Newman v Asbury Park and Ocean Grove Bank*, 120 N. J. Law, 122, that a creditor of the Asbury Park and Ocean Grove Bank existing prior to re-opening could not proceed against the Bank in its status as altered by the re-organization plan sanctioned, by Statute and approved by the Commissioner.

On November 21st, 1935, all preferred stock was retired and common stock was in lieu thereof issued and actually delivered "to all those for whose benefit said preferred stock had been issued" (See Stipulated Supplemental State of Case, page 3). This retirement of preferred stock and the issuance of common stock was made pursuant to an order of the Court of Chancery on proceedings had on notice. These proceedings are set forth in full in the Stipulated Supplemental State of Case and designated as Exhibit D, page 9.

When the Bank re-opened on May 1st, 1933, all prior creditors and depositors had been determined on duly published notice. These individuals, under the approved re-opening program, participated in all assets of the Bank in the exact proportion as their respective claims bore to the original total liability of the Bank. The common stock issued in 1935 was delivered by the aid of fractional shares

on precisely the same ratio as was also the preferred stock of the liquidating corporation (See Exhibit D, Stipulated Supplemental State of Case).

Because of the failure of the petitioner to present the full State of Case to this Court, counsel for respondents felt it necessary to preface its brief by the foregoing statement.

STATEMENT OF CASE.

In 1921, the Asbury Park and Ocean Grove Bank discounted for Giordano, the petitioner herein, a \$350.00 note. Giordano failed to pay the note and judgment was entered in 1922. In satisfaction of this judgment Giordano gave a new note. This note was secured by a mortgage covering the premises. The Bank did not record this mortgage.

When Giordano discovered that the Bank had not recorded the mortgage, he encumbered the property with several other mortgages, one of which was to the Searle Memorial Home (R. page 38). When this second note remained unpaid for three years the Bank took judgment on February 24th, 1925.

Giordano appealed from the judgment, claiming, among other things, that both the note and mortgage were procured by duress. His application to list the appeal was dismissed by the New Jersey Supreme Court (*Giordano v. Asbury Park and Ocean Grove Bank*, 3 N. J. Misc. 555 (1925)).

Another gesture concurrent with that appeal was Giordano's launching an action against the Bank for conspiracy and slander.

For lack of prosecution a Rule to Show Cause Why the Judgment of Nonsuit should not be opened was discharged by the New Jersey Supreme Court. Giordano's appeal to the New Jersey Court of Errors and Appeals was dismissed (*Giordano v. Asbury Park and Ocean Grove Bank*, 103 N. J. Law, 194 (1926)).

Two years after entry of judgment, Giordano's premises were sold under execution. The Asbury Park and Ocean Grove Bank, making a nominal bid of \$100.00, bought in the property, which consisted of a plot of ground in Asbury Park, 117 feet by 122 feet, upon which were erected several frame houses. The buildings were in gross disrepair. The land had been sold for taxes in 1925, and taxes for 1926 and 1927 were unpaid.

By this time Giordano, in addition to his discovering that the Bank's mortgage was unrecorded and his finding a mortgage lender, the Searle Memorial Home, found another lender to whom mortgages were given aggregating \$4,000.00 (See R. page 64).

This execution sale by the Bank was followed by a foreclosure of the first mortgage on the premises in question held by the Searle Memorial Home. The Bank's execution sale took place on May 31st, 1927 (See R. page 72) after being adjourned from week to week for nine weeks from March 28th, 1927 (See R. pages 73 and 74).

The execution sale by the Sheriff under the foreclosure of the first mortgage held by the Searle Memorial Home took place in September of 1927 (See R. page 75). The respondent, The Asbury Park and Ocean Grove Bank, purchased the premises in question at this foreclosure sale.

Including the amount bid at the foreclosure sale resulting in the delivery to it of a Sheriff's deed, the Bank in satisfaction of all liens and charges actually paid out in cash the sum of \$11,091.07 (See R. pages 78 and 79) and lost the

entire amount of its judgment. A year later the Bank sold the premises to the respondents, Strada and Rowe, for \$14,-000.00 (R. page 91). The new purchasers spent for repairs \$3,251.29 (R. page 92).

After waiting three years the petitioner, Giordano, filed a bill in the Court of Chancery of New Jersey on April 24th, 1930 (R. page 1) to set aside the sale on the ground that the price was inadequate and there was a conspiracy to defraud. On final hearing, Vice Chancellor Berry of the New Jersey Court of Chancery dismissed the bill (9 N. J. Misc. 1008 (R. pages 96-103)).

On October 7th, 1931, Giordano filed a Notice of Appeal from this decision of the Court of Chancery of New Jersey to the Court of Errors and Appeals of the State of New Jersey (R. page 106). This Notice of Appeal was never served upon the respondents herein, or their attorneys (R. page 106).

For ten years Giordano remained silent, and then on October 27th, 1941, he filed his Petition of Appeal (R. page 107). This appeal was submitted to the New Jersey Court of Errors and Appeals in the May Term, 1944, and the Court, at that time, considered both the respondents' motion to dismiss the appeal for lack of diligence on behalf of Giordano and also considered the merits of the case. The New Jersey Court of Errors and Appeals in affirming the decree below held "there was no diligence in the prosecution of the appeal and it should have been dismissed. Since we have examined the case and find no merit in the appeal, the decree will be affirmed with costs to the respondents." (*Giordano v. Asbury Park and Ocean Grove Bank*, 135 N. J. Eq. 511).

Giordano then made an application to the New Jersey Court of Errors and Appeals in the form of a petition for Re-hearing and Re-argument, at which time Giordano then

raised, for the first time, his contention that his constitutional rights were violated in that it was his right to have the property sold in parcels and not in bulk. Nowhere in the record of petitioner does it appear that the premises in question consisted of separate parcels, but rather that there were several frame houses erected on a plot, 117 feet by 122 feet.

The petitioner, in his brief, makes many loose statements, none of which are supported by fact or proof. One of these is that the petitioner was confined to an insane asylum under instructions from one of the attorneys for the respondent bank, and petitioner contends that this allegation was not denied. There was no proof whatsoever offered for this contention, nor did it appear in the original record, and it was not until 1944. when the petitioner in an application to the New Jersey Court of Errors and Appeals for permission to appeal to this Court, that this contention of Giordano of his insanity was raised for the first time, and in view of any absence of proof therein contained, it was not deemed necessary to have answered it.

ARGUMENT.

Point I.

Whatever interest that the petitioner, Giordano, had in the premises in question he encumbered by a mortgage to the Searle Memorial Home; whatever interest the respondent, The Asbury Park and Ocean Grove Bank, had in those premises by virtue of its execution sale under its judgment;

and whatever right Giordano had in such interest of the Bank, were all cut off or rendered academic by the foreclosure sale.

That the Bank was incidentally the highest foreclosure bidder should no more expose it or the sale to attack than if the property had been knocked down to a stranger.

The execution sale which the petitioner, Giordano, wants to set aside and by which he now claims he was deprived of his property without due process of law, was by operation of law, set aside by the Searle Memorial Home foreclosure seventeen years ago. Neither the Sheriff's deed, nor the foreclosure sale productive of it, is attacked, nor are the parties to that foreclosure made parties here.

Point II.

The petitioner, Giordano, in citing the New Jersey case of *Burke v. Gunther*, 128 N. J. Eq. 574, to the effect that mere lack of time does not constitute laches, and in an attempt to explain his own delay, does not come under the provision in the rule laid down in that and other cases cited. Giordano in this connection alleges that he was confined to a mental institution, but there is no such proof of this allegation.

The point in question goes a whole lot further than his alleged contention that there was a gross inadequacy of price bid for the land at the Sheriff's sale under the Bank's foreclosure. Disregarding for a moment the fact that the respondent bank herein obtained perfect title to the premises by the Searle foreclosure sale, we have a complete change of position by the respondent bank. An entirely new Board of Directors and Officers took over in the new

Asbury Park and Ocean Grove Bank when it was re-opened after the Bank closing.

Giordano failed to file any proof of claim with the Bank as provided for by Statute. The record fails to disclose any *Lis Pendens* sub judice except petitioner's recital in his Replication (R. page 32) as to a "double *Lie Pendants* filed on March 1928" when an "original bill of complaint was filed." Giordano's bill to the Court of Chancery, the subject matter herein, was filed April 24th, 1930. (R. page 1).

When the Bank re-opened on May 1st, 1933, all prior creditors and depositors had been determined on duly published notice. These individuals, under the approved re-opening program, participated in all assets of the Bank in the exact proportion as their respective claims bore to the original total liability of the Bank (see Details of Plan, Exhibit D, Stipulated Supplemental State of Case).

The Statutes and all attendant proceedings on notice would appear to make this ratio final and free from re-adjustment, notwithstanding the appearance of some later claim that the total liability base should be enlarged.

Any enlargement, without a like increase in assets, would necessarily take some of the property belonging to these other creditors. They cannot be deprived of their property, at least not without being made parties to litigation, having that deprivation as its ultimate subject matter.

The New Jersey Court of Errors and Appeals in the case of *Newman v. Asbury Park and Ocean Grove Bank*, supra, held this legislation constitutional. Consequently, after thirteen years of unexplained delay, the petitioner seeks to obtain a share in the property of others. These other creditors took it without actual or constructive notice of the alleged rights of the petitioner which his long silence so effectively concealed.

The petitioner now contends that he was deprived of his

property without due process and his rights under the Fourteenth Amendment were contravened, whereas, the fact is that should the petitioner succeed the other creditors of the Bank, who properly filed their claims, would now be deprived of their property without due process, which property they took without any actual or constructive notice of petitioner's alleged rights.

The petitioner in his argument fails to call to this Court's attention the closing of the Bank, its subsequent re-organization, the distribution made to the creditors of the old Bank, and his failure to file any proof of claim against the assets of the old Bank as required by Statute.

The instant problem goes a whole lot further than the petitioner's contention that his property was sold for \$350.00. The Bank in satisfaction of all liens and charges, including mortgages and taxes on the premises, paid upwards of \$11,000.00 in addition to its judgment, and also obtained a perfect title to the premises in question as the result of its purchase of the said premises at the Searle Memorial Home foreclosure sale, which sale has never been attacked by the petitioner.

The cases cited by the petitioner, both in New Jersey, and in the United States Courts, are not in point because in the instant case there is no proof before the Court of any sale under the Bank's judgment of separate and distinct parcels, but there is ample proof that the long delay of the petitioner created a change in position of the Bank in question.

The petitioner, in his brief on page 10, under Point A, seems to concede that a change of position and a loss of evidence would greatly weaken his present contention but deliberately, or otherwise, he failed to include in his record

submitted to this court the fact of the complete change of position of the respondent, The Asbury Park and Ocean Grove Bank.

CONCLUSION.

The respondents, therefore, respectfully submit that this case is not one wherein this Court should exercise its power to grant a writ of certiorari because (1) whatever rights the petitioner may have had to his property were completely cut off by the Searle Memorial foreclosure sale, which sale has not been attacked by the petitioner and at which sale the respondent, The Asbury Park and Ocean Grove Bank, was the purchaser; (2) because the petitioner failed to file any proof of claim against the respondent bank during its re-organization proceedings, as provided by Statute; (3) because of the petitioner's unexplained delay of thirteen years from the filing of his notice of appeal to the prosecution of same; (4) because of the completely changed position of the respondent bank; and finally because allowing the petitioner to proceed against the assets of the old Bank would take away some of the property belonging to other creditors of that Bank, who properly filed their claims.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney for Respondents.